

Appeal from letter decision of Idaho State Office, Bureau of Land Management, requiring execution of stipulations as prerequisite to renewal of communications site right-of-way. I-5780.

Affirmed as modified and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Act of March 4, 1911

A communications site right-of-way issued pursuant to the Act of Mar. 4, 1911, 43 U.S.C. § 961 (1976), which expires after the effective date, Oct. 21, 1976, of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), may not be renewed under the Act of Mar. 4, 1911, because that Act was repealed by FLPMA.

2. Rights-of-Way: Applications -- Rights-of-Way: Conditions and Limitations

The Department of the Interior may condition approval of a right-of-way application for a communications site right-of-way by requiring acceptance of conditions for the protection of the public interest so long as such conditions are neither inconsistent with nor tend to unreasonably burden the proposed right-of-way.

APPEARANCES: Donald R. Clark, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Donald R. Clark has appealed from a letter decision of the Idaho State Office, Bureau of Land Management (BLM), dated June 23, 1980,

requiring execution of stipulations as a prerequisite to renewal of communications site right-of-way, I-5780. 1/ Appellant's right-of-way was originally issued on December 13, 1972, for a term of 5 years, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976). 2/ On December 13, 1977, BLM issued a decision stating that I-5780 expired on December 12, 1977, and that if renewal was desired, a renewal application should be filed along with certain information. On January 11, 1978, appellant filed for renewal. After compilation of a land report and an environmental analysis record, the Idaho Falls District Manager, BLM, recommended to the State Director, BLM, that the right-of-way be renewed, but that certain stipulations be executed.

In his statement of reasons for appeal, appellant challenged BLM's right or authority to require execution of the stipulations. He stated: "Some of your provisions \* \* \* would require me to have powers like unto God to enforce."

[1] Before reaching the question presented by this appeal, we must point out that BLM had no authority under the Act of March 4, 1911, as amended, supra, subsequent to October 21, 1976, to renew appellant's right-of-way. Section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976), repealed the Act of March 4, 1911, as amended, supra, effective October 21, 1976.

The preamble to the right-of-way regulations, 43 CFR Part 2800, published in the Federal Register on July 1, 1980, with an effective

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1/ BLM also required appellant to submit copies of Federal Communications Commission (FCC) permits for all users of his equipment, including eight listed in his renewal application. In his statement of reasons for appeal, appellant stated that two of the listed users were "no longer my customers or being served from East Butte" and that copies of FCC permits for the remainder were "give[n] [to] your Idaho Falls office." In a letter dated July 23, 1980, BLM stated that no copies of FCC permits had been received at the Idaho Falls District Office. As this case is being remanded, appellant should be given an opportunity to submit copies of the necessary FCC permits. See Donald R. Clark, 44 IBLA 130 (1979). 2/ Appellant's right-of-way was issued to cover certain additional radio equipment atop East Twin Butte, not already covered by a primary right-of-way, I-603. By letter dated July 22, 1980, BLM, noting that appellant had questioned the need for the additional right-of-way, indicated that he could "amend right-of-way I-603 to include the radio equipment previously authorized under I-5780." BLM outlined the procedure for doing so. There is no evidence that appellant has sought to amend right-of-way I-603.

date of July 31, 1980, 45 FR 44518, makes it clear that renewal under repealed authority is improper. Responding to comments under the heading Renewals of Right-of-Way Grants and Temporary Use Permits, the Department stated:

Some of the comments raised questions about grants that were issued under authority repealed by the Federal Land Policy and Management Act. The grants issued under authority that has been repealed cannot be renewed under that repealed authority. If an additional time is needed by a grant holder, an application for a grant under the provisions of title V of the Federal Land Policy and Management Act must now be filed. When the request for a new grant is considered, the question of renewability will be considered and handled in accordance with the provisions of this rule-making. The authorized officer does not have any authority to grant a renewal of an existing right-of-way grant under statutory authority that has been repealed. [Emphasis added.]

45 FR 44525 (July 1, 1980).

Presumably, BLM was acting pursuant to the repealed authority of the 1911 Act when it offered appellant an opportunity to renew his right-of-way in 1977. BLM had no authority to do so, nor does it have authority to renew the expired right-of-way under FLPMA. However, BLM does have authority under section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1976), to grant a new communications site right-of-way. The new regulations governing rights-of-way issued under FLPMA include application procedures in 43 CFR Subpart 2802. This case must, therefore, be remanded in order to allow BLM to determine whether appellant may receive a FLPMA right-of-way. <sup>3/</sup> Appellant may be required to provide additional information pursuant to the application procedures of the regulations.

[2] Despite our remand, we will rule on the question of whether BLM may properly require execution of the specified stipulations. It is clear that BLM may condition the grant of a right-of-way upon the execution of stipulations. 43 U.S.C. § 1764(c) (1976). However, such stipulations may not be inconsistent with or tend to unreasonably burden the proposed right-of-way. See Western Slope Gas Co., 40 IBLA 280 (1979); Grindstone Butte Project, 24 IBLA 49 (1976).

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<sup>3/</sup> The current regulations also provide for the amendment of rights-of-way granted prior to Oct. 21, 1976. See 43 CFR 2803.6-1 (45 FR 44535 (July 1, 1980)). This provision may be applicable to appellant's authorized use under right-of-way I-5780, or to any additional use within the ambit of right-of-way I-603, assuming I-603 is still in existence.

We have carefully reviewed the required stipulations and we cannot discern how they would be either inconsistent with or unreasonably burden appellant's proposed right-of-way. We note that stipulation Nos. 1 to 7 are substantially the same as those made a part of right-of-way I-5780 when originally issued. Stipulation Nos. 8 to 12 were added pursuant to a land report dated December 27, 1978. They provide for minimal disturbance of "the vegetation and surface \* \* \* from new building construction activities," the cleaning of all trash and excess construction materials, painting "to blend with the existing natural landscape," the removal of equipment no longer being used and application for rights-of-way by unauthorized users or removal of their equipment. Therefore, should BLM seek to impose these same stipulations on a FLPMA right-of-way grant to appellant, we specifically find them to be consistent with FLPMA and the implementing right-of-way regulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified and the case remanded to BLM for further action not inconsistent herewith.

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Bruce R. Harris  
Administrative Judge

We concur:

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Bernard V. Parrette  
Chief Administrative Judge

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Edward W. Stuebing  
Administrative Judge